

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SMARTEK21, LLC,

Plaintiff,

V.

VISIKARD, INC.; and KENNETH LIPSCOMB,

Defendants.

C17-1798 TSZ

ORDER

THIS MATTER comes before the Court on Plaintiff's Motion for Partial

Summary Judgment, docket no. 65. Having reviewed all papers filed in support of, and in opposition to, the motion, the Court enters the following order.

Background

This dispute arises out of a business deal gone bad. Plaintiff SmarTek21, LLC (“SmarTek21”) is one of several business entities owned by Al Lalji. Another of Lalji’s businesses, SmartBotHub signed a Letter of Intent (“LOI”) with Defendant VisiKard, Inc., owned by Defendant Kenneth Lipscomb, to “explore use of VK Travel, LLC as an entity through which to introduce the Travel BOT to market.” Declaration of Al Lalji (“Lalji Decl.”), docket no. 66, ¶ 4, Ex. A. The LOI is divided into binding and non-binding provisions, and by its own terms “does not in and of itself represent a binding

1 contract except as expressly set forth. . . .” *Id.*, Ex. A at 1. The parties agreed that “[t]he
2 proposed transactions subject to this letter of intent are subject further to due diligence
3 investigation into (non-exclusively) matters such as the status, ownership, intellectual
4 property and financials of each Party and to financing contingencies.” *Id.*, Ex. A at 2.¹
5 The agreement to explore a potential joint venture is contained in the non-binding section
6 of the LOI. *Id.*

7 Next, SmarTek21 LLC loaned VisiKard \$130,000 under three secured promissory
8 notes: (i) a November 3, 2016 Note in the amount of \$60,000; (ii) a November 30, 2016
9 Note in the amount of \$40,000; and (iii) a December 7, 2016 Note in the amount of
10 \$30,000 (together, the “Notes”). Lalji Decl., Ex. B. Each Note requires repayment of all
11 principal and interest on the earliest of (i) January 31, 2017, (ii) the date that an
12 acquisition of VisiKard is consummated, or (iii) when, upon or after the occurrence of an
13 event of default, such event of default remains uncured after notice to VisiKard. *E.g., id.*
14 at 11. The Notes also contain a provision stating that SmarTek21 “has had an
15 opportunity to ask questions and receive answers from [VisiKard] regarding the terms
16 and conditions of the offering and sale of this Note and believes it has received all the
17 information it considers necessary or appropriate for deciding whether to purchase this
18 Note.” *Id.* at 14. The Notes also contain a statutory notice that “oral agreements or oral
19 commitments to loan money, extend credit or forbear from enforcing repayment of a debt

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22 ¹ The other binding provisions of the LOI include, for example, agreements to enter into non-disclosure
23 and use agreements regarding intellectual property, disclaimers that no joint venture has been established,
licenses to use one another’s logos and names in marketing material. Lalji Decl., Ex. A at 1-2. None of
the binding provisions are relevant to the issues raised in the instant motion.

1 are not enforceable under Washington law.” *Id.* at 15. The Notes also state that in any
2 action related to the agreement, the prevailing party is entitled to reasonable attorneys’
3 fees and costs. Lalji Decl., Ex. B. VisiKard never made any payment on the Notes
4 before the end of January 2017. *Id.* ¶ 6.

5 During due diligence, the parties opted not to pursue further business with one
6 another, although they offer divergent explanations for that decision. SmarTek21 claims
7 that the deal failed because of VisiKard’s lack of cooperation or transparency. Lalji Decl.
8 ¶¶ 7-8. VisiKard views events differently, claiming that SmarTek21 agreed to loan more
9 than the amount in the Notes but was unable to obtain financing. Declaration of Kenneth
10 Lipscomb (“Lipscomb Decl.”), docket no. 69, ¶ 2. Because it received less than the
11 promised amount, VisiKard claims it was unable to pursue business opportunities which
12 “resulted in key engineering workers quitting and leaving VisiKard.” *Id.* ¶ 3. VisiKard
13 testifies that its “ability to repay . . . was completely dependent” on additional financing
14 which never arrived, and that SmarTek21 made “assurance[s]” that the business deal
15 would go forward, which was how VisiKard planned to repay the loans. *Id.* ¶¶ 4, 5.
16 According to VisiKard, SmarTek21 made “representations” that repayment was
17 “conditioned” on additional financing and on unspecified “other documents.” *Id.* ¶ 6; *see also id.* ¶¶ 8-10 (describing the additional financing and promises to pursue the joint
19 venture as conditions precedent to repayment).

20 SmarTek21 provided a notice of default to VisiKard on September 5, 2017.
21 Declaration of Chris Mason (“Mason Decl.”), docket no. 19, at 28-29. The parties then
22 negotiated a repayment plan. Mason Decl. at 22. The parties memorialized this plan
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1 with a Note Modification Agreement dated October 6, 2017, which established a six-
2 month repayment schedule for the total amount due of \$140,489.43 as of September 30,
3 2017. Lalji Decl., Ex. D. The Note Modification Agreement contained an integration
4 clause, in which the parties agreed that “[t]he Loan Document, including this Agreement,
5 contain or expressly incorporate by reference the entire agreement of the parties with
6 respect to the matters contemplated therein and supersede all prior negotiations or
7 agreements, written or oral. The Loan Documents shall not be modified except by
8 written instrument, executed by all parties.” *Id.*, Ex. D ¶ 5. The Modification Agreement
9 also explicitly modified the Loan Documents by requiring payment in full upon the date
10 of acquisition or “when, on or after the occurrence of an Event of Default . . . such Event
11 of Default remains uncured after any notice to Company required under this Note.” *Id.*,
12 Ex. D ¶ 2.3. The agreement again warned the parties that oral agreements or
13 modifications were not enforceable. *Id.* The non-default interest rate was changed to
14 nine percent, and the default rate became eighteen percent. *Id.*

15 VisiKard made none of the payments required by the Note Modification
16 Agreement. Lalji Decl. ¶¶ 12-13. SmarTek21 granted VisiKard another extension to
17 November 11, 2017, Declaration of Mark D. Kimball (“Kimball Decl.”), docket no. 67,
18 Ex. 4 at 2-3, but VisiKard again failed to make any payment. Lalji Decl. ¶¶ 12-13.
19 SmarTek21 issued a second Notice of Default on November 13, 2017 and filed a
20 complaint on November 30, 2017. Kimball Decl., Ex. 3; Complaint, docket no. 1.
21 VisiKard cross-claimed against SmarTek21’s attorney, Christopher Mason, alleging legal
22 malpractice related to Mason’s actions during the due diligence. Answer, docket no. 8.
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1 SmarTek21 then filed an amended complaint adding claims against Lipscomb. Amended
2 Complaint, docket no. 52. Mason, the third-party defendant, moved for summary
3 judgment, and the Court granted his motion on October 17, 2018, thereby dismissing him
4 from the case. Order, docket no. 62; Partial Judgment, docket no. 64. SmarTek21 now
5 moves for partial summary judgment on its first claim for breach of promissory notes
6 against Defendant VisiKard. Docket no. 65.

7 **Discussion**

8 **I. Standard of Review**

9 The Court shall grant summary judgment if no genuine issue of material fact exists
10 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).
11 The moving party bears the initial burden of demonstrating the absence of a genuine issue
12 of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Alternatively, a
13 movant must show that the plaintiff lacks competent evidence to support an essential
14 element of his or her claim. *Id.* at 322; *Luttrell v. Novartis Pharms. Corp.*, 894
15 F. Supp. 2d 1324, 1340 (E.D. Wash. 2012). A fact is material if it might affect the
16 outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
17 242, 248 (1986). To survive a motion for summary judgment, the adverse party must
18 present “affirmative evidence,” which “is to be believed” and from which all “justifiable
19 inferences” are to be favorably drawn. *Id.* at 255, 257. When the record, however, taken
20 as a whole, could not lead a rational trier of fact to find for the non-moving party,
21 summary judgment is warranted. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
22 475 U.S. 574, 587 (1986); *see also Celotex*, 477 U.S. at 322.

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1 **II. VisiKard Has Breached the Loan Documents and Injured SmarTek21.**

2 The Promissory Notes, Security Agreements, and Note Modification Agreement

3 (together, the “Loan Documents”) unambiguously require VisiKard to repay SmarTek21.

4 By failing to do so, VisiKard has breached these agreements and caused damage to

5 SmarTek21. To prevail on a claim for breach of contract, Plaintiff must prove (1) the

6 existence of “a valid contract, (2) breach of a duty arising under that contract, and (3)

7 resulting damage.” *Minnick v. Clearwire US, LLC*, 683 F. Supp. 2d 1179, 1187 (W.D.

8 Wash. 2010) (citing *Nw. Independ. Forest Mfrs. v. Dep’t of Labor & Indus.*, 78 Wash. App.

9 707, 712, 899 P.2d 6 (1995)). The Notes required repayment by a date certain or upon an

10 event of default, which included failure to make required payments. *See* Lalji Decl., Ex.

11 B at 11. The Note Modification Agreement likewise establishes an unambiguous

12 repayment plan. Lalji Decl., Ex. D. At no point has VisiKard made the required

13 payments, and there is no genuine dispute of material fact precluding summary judgment

14 in SmarTek21’s favor.

15 **III. There Is No Condition Precedent or Ambiguity in the Loan**
16 **Documents.**

17 In an attempt to manufacture a dispute of material fact, VisiKard argues that it had

18 a different understanding of the business arrangement between the parties, and that this

19 different understanding constituted a condition precedent to VisiKard’s performance.

20 Def.’s Response, docket no. 68, at 7-9. VisiKard also argues that the Loan Modification

21 Agreement’s modification of the repayment dates introduced ambiguity into the contracts

22 precluding summary judgment. *Id.* at 9-11. These arguments lack merit.

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1 There is no condition precedent in the Loan Documents. VisiKard points to a
2 provision in the Notes that states SmarTek21 “believes it has received all the information
3 it considers necessary or appropriate for deciding whether to purchase this Note.” *E.g.*,
4 Lalji Decl., Ex. B at 14. Somehow, VisiKard interprets this clause to mean that
5 SmarTek21 breached the contract when SmarTek21 loaned VisiKard less than \$200,000
6 and later opted not to pursue the joint venture based on the company’s experience with
7 VisiKard during due diligence. That interpretation strains logic and is belied by the plain
8 language of the Notes. Nothing in that provision contains any conditional language that
9 suggests it modifies other parts of the agreement or should be viewed as a condition
10 precedent.

11 More broadly, VisiKard’s belief that the agreements required SmarTek21 to loan
12 more money or to pursue the joint venture further is mistaken. The Loan Documents
13 contain no such requirements. In fact, the Loan Documents plainly contemplate that the
14 joint venture is subject to due diligence. Lalji Decl., Ex. A at 2. And the Notes cover
15 loans totaling \$130,000—they do not require more, and none of the other written
16 agreements require any more. The Loan Documents contain integration clauses stating
17 that these agreements supersede all other agreements including unwritten agreements,
18 and they expressly warn VisiKard that unwritten agreements to loan money are not valid
19 under Washington law. Washington employs an “objective manifestation theory of
20 contracts” under which courts “attempt to determine the parties’ intent by focusing on the
21 objective manifestations of the agreement, rather than on the unexpressed subjective
22 intent of the parties.” *See Hearst Communications, Inc. v. Seattle Times Co.*, 154

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1 Wash.2d 493, 503, 115 P.3d 262 (2005) (“We do not interpret what was intended to be
2 written but what was written.”) (citing *Berg v. Hudesman*, 115 Wash.2d 657, 801 P.2d
3 222 (1990)). VisiKard’s attempts to inject its subjective beliefs about the contracts—
4 beliefs that are inconsistent with the unambiguous language in these contracts—are
5 improper. *See In re Marriage of Schweitzer*, 132 Wash.2d 318, 327, 937 P.2d 1062
6 (1997) (“context rule” cannot be used to show intention independent of the instrument);
7 *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wash.2d 565, 569, 919 P.2d 594 (1996)
8 (rejecting attempt to vary the terms of a contract through citation to parol evidence that
9 attempted to modify the terms of the contract).²

10 **IV. The Court May Grant Summary Judgment Without Entering Partial
11 Judgment.**

12 VisiKard suggests that this Court cannot enter summary judgment under Federal
13 Rule of Civil Procedure 54(b), which requires courts to make certain findings regarding
14 the propriety of a partial judgment. The argument, however, is misplaced. The Court
15 may grant Plaintiff’s motion and enter an order that Plaintiff is entitled to summary
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18 ² VisiKard’s argument that Paragraph 2.3 of the Loan Modification Agreement is ambiguous is similarly
19 unpersuasive. VisiKard appears to argue that because the Notes required payment by the “earlier of”
20 several possible dates, and because the Loan Modification Agreement does not similarly specify the
21 sequence of “Payable Dates,” then the new payment schedule is somehow ambiguous. Def.’s Response,
22 docket no. 68, at 9-11. It is not. The original Notes required payment by the earlier of several events, the
23 earliest of which was the certain date of January 31, 2017. VisiKard did not pay, and SmarTek21
provided a notice of default. The Loan Modification Agreement establishes a new repayment schedule,
but continues to require accelerated repayment upon the event of an acquisition. No acquisition ever
occurred and VisiKard continued to miss every rescheduled payment date. There is no ambiguity here—
VisiKard received accommodations from SmarTek21 but nonetheless failed to meet the modified
repayment schedule.

1 judgment on its first claim. There are no genuine disputes of material fact that would
2 require a trial on the first claim. The remaining claims and defenses remain set for trial.³

3 **Conclusion**

4 For the foregoing reasons, the Court ORDERS as follows:

5 (1) Plaintiff's Motion for Partial Summary Judgment, docket no. 65, is
6 GRANTED. There is no genuine issue of material fact that VisiKard, Inc. is in material
7 breach of the Loan Documents, which include the three Promissory Notes, Security
8 Agreements, and Note Modification Agreement. SmarTek21, LLC is entitled to
9 judgment as a matter of law on its first cause of action for breach of contract. Plaintiff
10 SmarTek21, LLC is entitled to damages of \$163,942.90 from VisiKard, Inc. by reason of
11 its material breach of the Loan Documents. The Court will not enter partial judgment at
12 this time.

13 (2) Plaintiff will be entitled to reasonable attorneys' fees and costs in
14 connection with the First Cause of Action. Plaintiff may file a motion for attorneys' fees
15 pursuant to the Federal Rules of Civil Procedure and the Local Rules after the entry of
16 judgment.

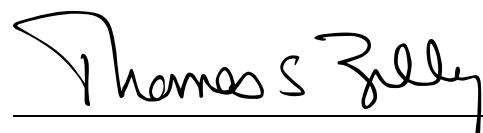
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19 ³ VisiKard suggests that its affirmative defense that it is entitled to a set off against SmarTek21's damages
20 precludes summary judgment on the breach of contract claim. Def.'s Response, docket no. 68 at 11-12.
21 VisiKard is not entitled to a set off, however, because the purported broken promises identified by
22 VisiKard are directly contradicted by the terms of the written agreements. Specifically, VisiKard argues
23 that SmarTek21 breached the Loan Documents by (1) loaning less than \$200,000, (2) representing that it
had sufficient information to loan VisiKard money, and (3) deciding during due diligence not to pursue
further business with VisiKard. *Id.* These are the same arguments VisiKard makes in support of a
condition precedent, repackaged as an argument that SmarTek21 breached the Loan Documents. The
Loan Documents unambiguously do not impose these duties on SmarTek21 and do not give rise to a set
off. Subjective beliefs and parol evidence cannot be used to contradict the terms of the written
agreement. *See, e.g., U.S. Life Credit Life Ins. Co.*, 129 Wash.2d at 569.

1 (3) Plaintiff's request to strike the Declaration of Kenneth Lipscomb, *see* Plf.'s
2 Reply, docket no. 70, at 7-9, is DENIED as moot.

3 (4) The Clerk is directed to send a copy of this Order to all counsel of record.

4 IT IS SO ORDERED.

5 Dated this 29th day of January, 2019.

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9 Thomas S. Zilly
10 United States District Judge
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